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No. 16-369

IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES; DEPUTY CHRISTOPHER CONLEY; AND DEPUTY JENNIFER PEDERSON,
Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF COUNTIES; NATIONAL LEAGUE OF CITIES; INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; CALIFORNIA STATE ASSOCIATION OF COUNTIES; LEAGUE OF CALIFORNIA CITIES; AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Each of the *amici curiae* has a strong interest in cases, such as this one, that implicate public safety and the liability of local police officers.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local

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[1] Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioners have filed a letter with the Clerk of the Court providing blanket consent to the filing of *amicus curiae* briefs. Respondents' consent has been provided by a letter that *amici* have delivered to the Clerk simultaneously with the filing of this brief.

government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, composed of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of California Cities (League) is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, composed of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The National Sheriffs' Association (Association), a 26 U.S.C. § 501(c)(4) non-profit organization, was formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States and to promote, to protect, and to preserve our nation's Departments/Offices of Sheriff. The Association has over 21,000 members and is a strong advocate for over 3,000 individual sheriffs located throughout the United States. Over 99% of

our Nation's Departments/Offices of Sheriff are directly elected by the people in their local county, city, or parish. The Association promotes the public-interest goals and policies of law enforcement in our Nation, and it participates in judicial processes (such as this case) where the vital interests of law enforcement and its members are at stake.

SUMMARY OF ARGUMENT

Under the Ninth Circuit's "provocation rule," any time an officer commits an actionable Fourth Amendment violation and violence ensues, the officer will be personally liable in damages for the resulting physical injuries. Pet. App. 6a; *see also* Pet. App. 22a-24a. This rule is legally flawed, the lower courts erred in invoking it here, and it should be expressly rejected by this Court. The Ninth Circuit alternatively purported to justify the same outcome based on an application of proximate causation principles, but that holding is equally wrong.

1. The Ninth Circuit held below that, if a police officer commits an actionable Fourth Amendment violation (such as, here, a search without a warrant), the officer is *automatically* personally liable under 42 U.S.C. § 1983 for any physical injuries that ensue, even if those injuries are the consequence of the officer's *reasonable* use of force to neutralize a perceived threat. Pet. App. 22a-24a.

a. Although the Ninth Circuit has stated that its provocation rule requires that the officer have acted "intentionally or recklessly," *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002); *see also* Pet. App. 22a, the Ninth Circuit held below that this requirement will be satisfied whenever the officer is "not entitled to qualified immunity." Pet. App. 23a.

Because qualified immunity must be overcome to establish a viable § 1983 claim, *see Pearson v. Callahan*, 555 U.S. 223, 231 (2009), the result is that the "recklessness" requirement is automatically met *whenever* there is an actionable Fourth Amendment violation. Pet. App. 23a.

b. In addition to confirming that the provocation rule does not in fact require recklessness, the Ninth Circuit's opinion in this case also made clear that the rule does not even require "provocation." Rather, all that is required is that the officer's actionable Fourth Amendment violation "'*create[d] a situation which led to the shooting* and required the officer to use force that might otherwise have been reasonable.'" Pet. App. 22a (quoting *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 539 (9th Cir. 2010)) (emphasis added).

2. The resulting *per se* rule—which imposes automatic liability for physical injuries that ensue from an actionable Fourth Amendment violation—is indefensible and should be rejected.

a. The Ninth Circuit's rule cannot be reconciled with the rights-specific focus of § 1983 liability. "'The first inquiry in any § 1983 suit' is 'to isolate the precise constitutional violation with which [the defendant] is charged.'" *Graham v. Connor*, 490 U.S. 386, 394 (1989) (citation omitted). The "validity of the [§ 1983] claim must then be judged by reference to the specific constitutional standard which governs that right[.]" *Id.* Likewise, "[i]n order to further the purpose of § 1983, the rules governing *compensation* for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis added).

Rather than apply this rights-specific analysis, the Ninth Circuit relied on the provocation rule to adopt an unorthodox mix-and-match approach that (1) grounded *liability* in the infringement of one right (*viz.*, the protection against search without a warrant), but then (2) awarded *damages* for personal injuries just as if the officers had been found liable for infringing two other rights *for which there was no liability* (*viz.*, the right to have officers knock and announce and the protection against excessive force).

b. The Ninth Circuit's provocation rule should also be rejected because it improperly disregards the substantive standards governing excessive force claims, and it weakens the protections of qualified immunity. The decision below squarely conflicts with *Graham* because, despite the complete absence of excessive force under *Graham*'s controlling standards, the lower courts nonetheless employed the provocation doctrine to hold the officers liable *for their use of reasonable force*. Moreover, because the chain of causation linking the warrantless search to the subsequent physical injuries necessarily runs through an action—the failure to knock and announce—for which there is qualified immunity, that intervening qualified immunity should have barred any liability for the Plaintiffs' physical injuries.

c. The Ninth Circuit's provocation doctrine is legally flawed for the additional reason that it disregards the directness requirement of the doctrine of proximate causation. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006); *Holmes v. Securities Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). Under the provocation rule, once an actionable Fourth Amendment violation has occurred, the officers are liable for any reasonable force they may later need to use in

the ensuing "situation" that the officers "created." Pet. App. 22a. Because the *per se* nature of the provocation rule omits any requirement to show that the "alleged violation led *directly* to the plaintiff's injuries," *Anza*, 547 U.S. at 461 (emphasis added), that rule is flatly contrary to proximate causation principles.

d. By imposing liability for the use of *reasonable* force, the provocation rule runs the risk of effectively punishing actions that may be necessary, in a given moment, to save lives. Although one purpose of § 1983 is to deter unconstitutional conduct, once a situation has reached the point where it is reasonable for officers to use force to protect themselves or others, those officers should *not* be deterred from doing so.

3. The Ninth Circuit was equally wrong in its alternative holding that the officers' failure to secure a warrant for the search of the shack proximately caused Plaintiffs' injuries. Pet. App. 24a-25a.

a. Because the exact same injuries would have occurred if the officers had performed the same search the same way *with* a warrant, the absence of a warrant plainly had no meaningful connection to the subsequent physical injuries. The requisite "direct relation" between Plaintiffs' physical injuries and the officers' failure to secure a warrant is simply absent. *Holmes*, 503 U.S. at 268.

b. Mendez's inadvertent actions in pointing a realistic BB rifle at the officers was a superseding cause that broke any chain of causation between the officers' initial failure to obtain a warrant and their subsequent defensive shooting. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008);

Archer v. Warner, 538 U.S. 314, 326 (2003). The Ninth Circuit held that Mendez's actions were foreseeable and that this foreseeability precluded the application of the superseding cause doctrine, but both of these holdings are wrong. It was *not* foreseeable that Mendez would just so happen to use a "BB gun rifle to help him sit up" on the futon. Pet. App. 69a. And the mere fact that violence against police officers is "foreseeable"—as it is in nearly every aspect of their work—is insufficient to defeat the application of the superseding cause doctrine.

ARGUMENT

In its opinion in this case, the Ninth Circuit held that, if a police officer encounters a civilian as a result of an actionable Fourth Amendment violation (such as, here, a search of a structure without a warrant), the officer is *automatically* personally liable under 42 U.S.C. § 1983 for any physical injuries that occur if the civilian displays or applies force against the officer and the officer responds with *reasonable* force. Pet. App. 22a-24a. Alternatively, the Ninth Circuit held that, where it is reasonably foreseeable that an officer's Fourth Amendment violation could be followed by a civilian display of force, that violation will be deemed to be the proximate cause of any injuries resulting from the officer's reasonable responsive force. Pet. App. 24a-25a. Both of these holdings are contrary to well settled law and would have grave implications for the safety of peace officers and the general public. The judgment resting on these holdings should be reversed.

I. The Ninth Circuit's *Per Se* Provocation Rule Conflicts With Settled § 1983 Case Law, Proximate Causation Principles, and Common Sense

Under the Ninth Circuit's *per se* "provocation rule," any time an officer commits an actionable Fourth Amendment violation and violence subsequently ensues, the officer will be personally liable in damages for the resulting physical injuries. Pet. App. 6a; *see also* Pet. App. 22a-24a. This Court has previously recognized that "[t]he Ninth Circuit's 'provocation rule' ... has been sharply questioned elsewhere," *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 n.4 (2015), but the Court has not yet had the opportunity to repudiate the rule. It is now time to do so.

A. Under the Provocation Doctrine, an Officer Who Commits an Actionable Fourth Amendment Violation Is Automatically Liable for Any Ensuing Physical Injuries, Including Injuries From Using *Reasonable* Defensive Force

As originally articulated, the Ninth Circuit's provocation rule provided that "where an officer [1] intentionally or recklessly [2] provokes a violent confrontation, [3] if the provocation is an independent Fourth Amendment violation, he may be liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002); *see also* Pet. App. 22a. That rule would be problematic enough,[2] but as this case shows, the Ninth Circuit

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[2] Even as initially formulated, the Ninth Circuit's provocation rule suffers from many of the same legal flaws discussed below. In particular, even a more narrow reading of the provocation

has effectively eliminated the recklessness and provocation requirements, thereby producing an even more remarkably sweeping—and deeply flawed—categorical rule.

First, the Ninth Circuit held below that the requirement that the officer must have acted "recklessly" will be satisfied whenever the officer is "not entitled to qualified immunity." Pet. App. 23a. Because qualified immunity must be overcome to establish a viable § 1983 claim against an officer, *see Pearson v. Callahan*, 555 U.S. 223, 231 (2009), the result is that the Ninth Circuit's "recklessness" requirement is automatically met *whenever* there is an actionable Fourth Amendment violation. Pet. App. 23a.

Second, the opinion below confirms that, under Ninth Circuit case law, the requirement that the officer "provoke[] a violent confrontation" with a civilian does not actually require either provocation or a violent response by the civilian. Pet. App. 22a-23a. Rather, it is sufficient that the officer's actionable Fourth Amendment violation "'*create[d] a situation which led to the shooting* and required the officer to use force that might otherwise have been reasonable.'" Pet. App. 22a (quoting *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 539 (9th Cir.

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doctrine—*i.e.*, one that requires subjective intent or recklessness and that requires actual provocation—would still improperly depart from this Court's objective test for evaluating excessive force claims under the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386 (1989). And rather than apply this Court's standards for evaluating the "precise constitutional violation" at issue, *see id.* at 394, such a rule would create a novel hybrid tort that is unmoored from the specific standards that govern particular claims for violation of constitutional rights under § 1983.

2010)) (emphasis added). Thus, "the predicate constitutional violations (here, an unlawful search without a warrant) need not be ... 'provocative' in the sense of *inciting* a violent response." Pet. App. 118a (emphasis added). Indeed, as this case illustrates, the Ninth Circuit's provocation doctrine does not require that the officer's actions actually *cause any reaction* by the civilian at all, much less a violent one. The court of appeals specifically held that it was irrelevant that Mendez "was not responding to the deputies' actions" when he moved the BB gun; all that mattered was that Officer Conley's unlawful search "'created the situation that led to the shooting.'" Pet. App. 22a (citation omitted). And because the officers are liable for all physical injuries that ensue from the "situation" they created, *see id.*, it does not matter if the civilian responds with a wildly disproportionate violent response. As the district court explained, it is irrelevant whether the officer acted "in a way that necessarily 'deserved' a violent response." Pet. App. 119a.

Accordingly, as construed by the Ninth Circuit, the so-called "provocation doctrine" establishes a sweeping *per se* rule that imposes personal liability for physical harm *whenever* an officer commits an actionable Fourth Amendment violation that then leads to a situation in which the police end up using *reasonable* defensive force that injures a civilian. This *per se* rule is indefensible and should be rejected.

B. The Ninth Circuit's Provocation Rule Is Contrary to Settled Law and Has Disturbing Practical Implications

The Ninth Circuit's provocation doctrine contravenes settled law concerning the scope of § 1983 lia-

bility, evades the standards governing excessive force claims, eviscerates the protections of qualified immunity, and disregards well-established proximate causation principles. On top of that, the doctrine creates troubling practical incentives that are inconsistent with the safety of police officers and the general public. It should be explicitly rejected.

1. The Provocation Rule Disregards the Rights-Specific Focus of § 1983 Liability

The automatic liability for physical injuries that the provocation rule attaches to *any* actionable Fourth Amendment violation cannot be reconciled with the rights-specific focus of § 1983 liability.

As applicable here, § 1983 provides that an officer who "subjects, or causes to be subjected," any person "to the deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]" 42 U.S.C. § 1983. As the text of the statute makes clear, the "injur[y]" that gives rise to a right to compensation is the "deprivation" of a *particular* "right[] ... secured by the Constitution." *Id.* Consequently, "'[t]he first inquiry in any § 1983 suit' is 'to isolate the precise constitutional violation with which [the defendant] is charged.'" *Graham*, 490 U.S. at 394 (quoting *Baker v. McCollan*, 443 U.S. 137, 140 (1979)). Those specific claimed constitutional violations will define both the pertinent substantive standards for determining liability as well as the relevant scope of compensable damages. Thus, once the particular alleged violations are identified, the "validity of the [§ 1983] claim must then be judged by reference to the specific constitutional standard which governs that right[.]" *Id.* The

scope of available damages in a § 1983 action must likewise be tied to the specific violations at issue. "In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected *by the particular right in question.*" *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis added).

As this case well illustrates, the Ninth Circuit's *per se* provocation rule impermissibly departs from § 1983's required focus on "the particular right in question." *Id.* The Plaintiffs alleged three distinct constitutional violations: (1) an improper warrantless search in the opening of the door to the shack; (2) the failure to knock and announce before opening that door; and (3) excessive force in the shooting of Plaintiffs. Pet. App. 6a-7a. Under the proper rights-specific analysis, the Ninth Circuit should have evaluated each of these three claims in light of the "specific constitutional standard which governs that right," *Graham*, 490 U.S. at 394, and if the right was violated and qualified immunity does not apply, then the court should have "tailored" the available damages "to the interests protected by [that] particular right in question," *Carey*, 435 U.S. at 259.

Here, the lower courts' finding of liability ultimately rested only on the first of these three theories, *viz.*, that the officers violated the warrant requirement and that qualified immunity was not available for that violation. Pet. App. 18a, 20a, 25a.[3] But as

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[3] The district court specifically found that the officers had probable cause to believe that the fugitive for whom they were searching (O'Dell) was inside the shack, *see* Pet. App. 93a, and the Ninth Circuit expressly analyzed the case "while assuming the district court's probable cause predicate," Pet. App. 11a n.5.

the district court recognized, a damages calculation that is tailored to the interests protected by the warrant requirement yields, at most, only nominal damages here. *See* Pet. App. 52a-53a, 135a; J.A. 238. Conversely, the Plaintiffs' physical injuries *are* tied to the interests protected by the rights at issue in the knock-and-announce and excessive force claims, *see Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (knock-and-announce requirement protects "human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident"); *Graham*, 490 U.S. at 394-95 (protection against unreasonable "seizure[]" protects against use of excessive force), but the Ninth Circuit held that there was no substantive liability under either of these two claims. *See* Pet. App. 20a, 22a.

Accordingly, under the required rights-specific focus, Plaintiffs' effort to recover for physical injuries under § 1983 should have failed. Instead, the Ninth Circuit's *per se* provocation rule improperly allowed the court to employ a mix-and-match approach that stitched together a hybrid § 1983 claim, one that predicated the determination of liability on one set of interests and the determination of damages on a different set of interests. That error alone requires rejection of the provocation rule.

2. The Ninth Circuit's Provocation Rule Dilutes the Standards for Excessive Force Claims and Undermines the Protections of Qualified Immunity

Moreover, as this case demonstrates, the Ninth Circuit's provocation rule disregards the substantive standards governing excessive force claims and also weakens the protections of qualified immunity.

First, the Ninth Circuit's *per se* provocation doctrine improperly authorizes an end run around the substantive standards that govern police use of force. Apart from their reliance upon the provocation rule, the lower courts did *not* find that the officers in this case engaged in any use of excessive force—nor could they have done so on this record. Pet. App. 22a, 108a. Although the courts below held that the officers clearly erred in failing to obtain a warrant before opening the unlocked door of the shack, *see* Pet. App. 18a, 97a, there was nothing about the degree of force that they used at any time in the incident that could be said to have been objectively unreasonable. *Graham*, 490 U.S. at 396-97. Despite the complete absence of excessive force under *Graham*'s controlling standards, the lower courts nonetheless employed the provocation doctrine to hold the officers liable for their use of *reasonable* force. Indeed, confirming its stark departure from *Graham*'s standards, the district court entered judgment on a novel, hybrid § 1983 claim that it styled as one for "excessive force (based on *Alexander/Billington* provocation)." Pet. App. 53a. And, confirming its comparable evasion of the *Graham* standards, the Ninth Circuit upheld this judgment based on the court's application of its *per se* provocation rule to the officers' actionable violation of the warrant requirement. Pet. App. 22a-23a.

The resulting conflict between the Ninth Circuit's provocation rule and *Graham* is clear. Contrary to *Graham*, the Ninth Circuit's rule does not consider the severity of the crime at issue nor the threat to others posed by the plaintiff, nor does it even consider the level of force used by the officer. *See supra* at 9-10. Rather, any use of reasonable force—even to prevent a suspect from killing innocent victims—will effectively be deemed "unreasonable as a matter of

law," *see* Pet. App. 111a, if it occurs after an actionable Fourth Amendment violation. *See, e.g., Glenn v. Washington County*, 673 F.3d 864, 879 (9th Cir. 2011) (applying provocation doctrine to hold officers liable for reasonable use of force in shooting of suspect whom they reasonably feared would stab his parents). But where, as here, the use of force was warranted and reasonable "at the moment" it was applied, *Graham*, 490 U.S. at 396, the resulting deprivation is justified, and "the injury caused by a justified deprivation ... is not properly compensable under § 1983," *Carey*, 435 U.S. at 263.

Second, as this case illustrates, the Ninth Circuit's provocation doctrine undermines the protections of qualified immunity. As the Ninth Circuit itself appeared to recognize, the officers' failure to knock and announce before opening the door of the shack was much more closely causally connected to the ensuing tragedy than was the failure to have obtained a warrant. Pet. App. 25a (stating that violence was the reasonably foreseeable result "when the officers barged into the shack *unannounced*") (emphasis added). However, the Ninth Circuit held that liability could *not* be predicated on the failure to knock and announce because the officers were entitled to qualified immunity on that claim. Pet. App. 20a. Despite the fact that the officers were entitled to qualified immunity for this (comparatively speaking) more-proximate cause, the Ninth Circuit effectively eviscerated that qualified immunity by cobbling together a hybrid § 1983 claim that improperly combined (1) the officers' liability on the more-remote error of having failed to obtain a warrant with (2) the damages that occurred *in the aftermath* of the failure to knock and announce. Because the chain of causation linking these two elements *necessarily runs through*

an action for which there is qualified immunity, that intervening qualified immunity should have barred any liability for the Plaintiffs' physical injuries. The provocation rule's disregard of the protections of qualified immunity provides yet further reason to reject it.

3. The Ninth Circuit's Provocation Rule Contravenes Settled Principles of Proximate Causation

The Ninth Circuit's provocation doctrine is legally flawed for the additional reason that it contravenes the principles of proximate causation that apply in § 1983 actions. *See Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (scope of liability under § 1983 "should be read against the background of tort liability," including principles of proximate causation).

While the doctrine of proximate cause is not readily reduced to a "universal formula," W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS § 42, p. 279 (5th ed. 1984), at the heart of the concept is "a demand for some *direct relation* between the injury asserted and the injurious conduct alleged," *Holmes v. Securities Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992) (emphasis added). "[T]he central question [the Court] must ask is whether the alleged violation led *directly* to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (emphasis added).

The Ninth Circuit's *per se* provocation rule impermissibly disregards the directness requirement of the doctrine of proximate causation. Although the Ninth Circuit alternatively concluded that proximate causation was satisfied here, *see* Pet. App. 24a-25a, that holding was wrong. *See infra* at 22-27. But more

importantly, the expressly *alternative* nature of that holding confirms that the Ninth Circuit's provocation rule is *not* based upon, and does not incorporate, the limitations imposed by proximate causation. That much is also clear from the Ninth Circuit's articulation of the provocation doctrine in this case. As the court of appeals explained, once an actionable Fourth Amendment violation has occurred, the provocation rule will render the officers liable for any violence that ensues from the "situation" that the officers "created." Pet. App. 22a. That is flatly contrary to proximate causation principles. The fact that a claimed physical injury is at the end of a causal chain in which an actionable Fourth Amendment violation is the first link is *not* enough to establish that the injury is the *direct* consequence of the violation. The provocation rule thus does not apply proximate-causation principles; instead, it simply excises them from the inquiry.

4. The Provocation Rule Creates Significant Practical Concerns That Implicate the Safety of Officers and the Public

In addition to being directly contrary to well-settled law, the Ninth Circuit's unorthodox provocation rule creates significant practical concerns. A few hypotheticals, drawn from the facts of actual cases, help to illustrate the point.

Consider, for example, a variation of the facts presented by this Court's decision in *Groh v. Ramirez*, 540 U.S. 551 (2004). There, the ATF applied for, obtained, and executed a search warrant on a home. As it turned out, the portion of the form on which they should have listed the things to be seized simply

repeated the address of the place to be searched, though the warrant application itself had properly listed those items (a variety of powerful weapons, including grenade launchers and rocket launchers). *Id.* at 554, 557. This Court denied qualified immunity based on the warrant's obvious facial invalidity. *Id.* at 563. Now change the facts of *Groh* by supposing that, upon the officers' execution of the invalid warrant, a person inside the home opened fire with a firearm or even the rocket launcher—not because the agents lacked a valid warrant, but merely because the person despised federal agents. Under the Ninth Circuit's provocation rule, the glitch on the warrant would render the agents automatically liable under § 1983 for any physical injuries *if they decide to return fire*. At that moment, the officer can act to preserve his or her own life only at the price of paying millions in damages for the resulting injuries to their assailant. The provocation rule would thus lead to a perverse your-money-or-your-life decision that has no grounding in § 1983 or in common sense.

One need not rely only on hypotheticals to see the provocation doctrine's mischief in action. In *Glenn*, a young man, Lukus Glenn, showed up drunk at his parents' house at 3:00 a.m. 673 F.3d at 866-67. After arguing over his parents' refusal to let him ride his motorcycle, Glenn began smashing household property. *Id.* His parents tried to get Glenn's friends to intervene, but they were unable to calm him down. *Id.* at 867. Glenn then held a pocket knife to his throat and threatened to kill himself. *Id.* His mother called the police, warning that Glenn was "out of control, busting our windows, and has a knife and is threatening us." *Id.* She told them that Glenn "was threatening to kill everybody" and might "run at the cops with a knife." *Id.* at 873. She explained that he

was almost 6 feet tall and athletic. *Id.* at 867. The police raced to the scene and arrived minutes later. *Id.* They told Glenn to drop the knife, but he did not do so or respond in any way. *Id.* at 868. After several minutes of shouting at him to drop the weapon, the police pelted him with bean bags in an attempt to subdue him. *Id.* at 869. Glenn responded by moving to enter the house. *Id.* The officers then "reasonably feared that he could have attacked his parents with the knife so they shot [Glenn] to protect his family." *Id.* at 879. In the ensuing § 1983 action, the district court granted qualified immunity to the officers but the Ninth Circuit reversed.

The Ninth Circuit in *Glenn* denied qualified immunity as to the use of the beanbags, suggesting among other things that the officers could have tried gentler "persuasion" rather than "shouting" prior to trying to subdue Glenn with the beanbags, and that they could have used a different form of non-lethal force, namely a taser. *Id.* at 872-78. The Ninth Circuit asserted that even if, "as the district court concluded, deadly force was a reasonable response to [Glenn's] movement toward the house, a jury could find that the beanbag shots provoked [Glenn's] movement and thereby precipitated the use of lethal force." *Id.* at 879. "If jurors conclude that the provocation—the use of the beanbag shotgun—was an independent Fourth Amendment violation, the officers 'may be held liable for [their] otherwise defensive use of deadly force.'" *Id.* (quoting *Billington*, 292 F.3d at 1189). And because the Ninth Circuit's provocation rule does not require reckless or intentional provocation, or even "recklessness" in a tort sense, *see supra* at 8-10, so long as there was "an independent Fourth Amendment violation" in the initial use of non-lethal force to stop Glenn, the officers would be

liable for the subsequent reasonable use of lethal force to save innocents.

Under the Ninth Circuit's *per se* provocation rule, once the officers committed an initial actionable Fourth Amendment violation by firing the beanbags, *any* subsequent use of force by the officers to subdue Glenn and prevent him from killing his parents would entitle Glenn to monetary damages for injuries he incurred from that force. Thus, *at the moment Glenn posed a threat to his parents*, the provocation rule would present the officers with an even more disturbing choice between the officers' money and *someone else's* life. An officer who heeded the perverse deterrent effect potentially created by the provocation doctrine would, of course, be derelict in his or her solemn duty to protect the innocent, but an officer who upheld that duty would pay potentially millions in damages for having done so.

A variation on the facts of this case further illustrates the troubling nature of the Ninth Circuit's rule. Had it turned out that *O'Dell* was present in the shack by permission of Ms. Hughes and had *he* opened fire to prevent his arrest, presumably the exact same liability would have followed under the Ninth Circuit's approach. If the officers harmed O'Dell to protect themselves or third parties, they would be liable to O'Dell, even though it would have been O'Dell "who put [a third party] in danger" by his actions. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014). While "it would be perverse if [a criminal's] disregard for [a third party's] safety worked to his benefit" financially, *id.*, the potential for that sort of troubling outcome is inherent in the Ninth Circuit's provocation rule.

As these examples illustrate, the provocation rule runs the risk of creating inappropriate, if not dangerous, practical incentives. To be sure, one purpose and effect of "§ 1983 is to deter state actors" via monetary damages from unconstitutional actions. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). But once a situation has escalated to the point where it is reasonable for the officers to use force to stop a violent act—such as a shooting—police officers should *not* be deterred. As the D.C. Circuit has explained, "police officers could not protect the public if tort law deterred them from approaching and detaining potentially violent suspects." *Hundley v. District of Columbia*, 494 F.3d 1097, 1105 (D.C. Cir. 2007). And this Court has made clear that it is "loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they ... put other people's lives in danger." *Scott v. Harris*, 550 U.S. 372, 385 (2007). Once the police confront a situation in which they must act reasonably to use force to protect themselves and others, they should not be deterred from doing so by the threat of § 1983 liability. By contrast, *at the earlier time when an officer makes an error in failing to obtain a warrant*, the then-speculative prospect of a subsequent armed confrontation that could result in automatic personal liability for physical injuries is unlikely to have a significant deterrent effect that would meaningfully add to the more directly applicable deterrents to the unlawful search (namely, the exclusionary rule and liability for the search itself). *Cf. New York v. Harris*, 495 U.S. 14, 20-21 (1990) (where an arrest is made following a warrantless entry, suppression of evidence is sufficient deterrence and suppression of post-arrest statements at stationhouse is unnecessary).

These practical considerations vividly confirm that

the Ninth Circuit's provocation doctrine is a patently erroneous construction of § 1983.

II. The Ninth Circuit's Alternative Proximate Causation Analysis Was Legally Flawed

The Ninth Circuit alternatively held that, "under basic notions of proximate cause," the officers' failure to secure a warrant for the search of the shack rendered them liable for their subsequent *reasonable* use of force. Pet. App. 24a-25a. That holding is equally flawed and equally troubling in its implications.

As noted earlier, to show proximate causation, Plaintiffs had to establish a "direct relation" between their physical injuries and the officers' failure to secure a warrant. *Holmes*, 503 U.S. at 268. Here, for two separate reasons, the requisite direct connection was wholly absent. First, because the exact same injuries would have occurred if the officers had performed the same search the same way *with* a warrant, the absence of a warrant plainly had no meaningful connection to the subsequent physical injuries. Second, Mendez's inadvertent actions in pointing a realistic BB rifle at the officers was a superseding cause that broke any chain of causation between the initial failure to obtain a warrant and the subsequent defensive shooting by the officers.

A. The Officers' Failure to Secure a Warrant Was Too Far Removed From Plaintiffs' Injuries to Be Their Proximate Cause

As explained earlier, the officers' *only* actionable Fourth Amendment violation was their opening of the unlocked door to the dilapidated shack, in which they had probable cause to believe that a dangerous fugi-

tive was hiding, without first securing a warrant. *See supra* at 12-13. But that violation did not proximately cause Plaintiffs' physical injuries because there is not a sufficiently direct causal relationship between the officers' *failure to get a warrant* and the shooting that ensued.

The lack of the requisite causal connection is confirmed by the fact that, if the officers had had a warrant, the opening of the door to the shack would have happened just the same. The district court expressly found that the officers had probable cause, *see* Pet. App. 93a, and so this was not a situation in which the requirement to obtain a warrant would have prevented the search from occurring. Nor did the lack of a warrant contribute in any way to the manner in which the search was carried out; indeed, the Ninth Circuit found no actionable violation in the officers' conduct of the search and instead expressly held that the failure to knock and announce at the shack was protected by qualified immunity. Pet. App. 20a. To satisfy proximate causation, it is not enough that there was a procedural failure at the outset of the search; it is necessary to show that this procedural failure directly caused the shooting. Plaintiffs failed to do so.

Indeed, this case is analytically similar to *Carey*. There, the plaintiffs were suspended without a proper hearing, a violation of their due process rights. The court of appeals held—to the agreement of the parties and this Court—that if the plaintiffs "would have been suspended even if a proper hearing had been held, then [they] will not be entitled to recover damages to compensate them for injuries caused by the suspensions." 435 U.S. at 259-60. So too here: if the opening of the door would have happened just the

same even with proper procedures (*i.e.*, because there was probable cause), then that procedural error cannot justify damages flowing from the door's opening. *Cf. Hudson*, 547 U.S. at 592 (failure to knock and announce in executing warrant did not require suppression of evidence found in search because "[w]hether that preliminary misstep had occurred or *not*, the police would have executed the warrant they had obtained, and would have discovered" the evidence). And there is simply no basis to conclude that the officers would not have searched the shack with a warrant.

To be sure, had the officers obtained a warrant, the factual events might have played out differently in the sense that the officers would have opened the door at a different point in time, and Mendez might not have been moving the BB gun at that particular instant. But that speculation only serves to underscore the lack of any proximate causal connection between the failure to obtain a warrant and the shooting that ensued from the search. Whether or not the officers did or did not have a warrant at the moment they opened the shack door simply had no logical connection to how Mendez responded. Proximate causation looks to an immediate, direct relationship between cause and effect, and there is no such relationship between the lack of a warrant and the shooting.

B. By Inadvertently Pointing a Realistic BB Gun at the Officers, Mendez Broke Any Causal Chain That Began With the Officers' Failure to Obtain a Warrant

The Ninth Circuit's proximate causation analysis fails for the further reason that it is based on a

legally erroneous conception of superseding causation. The court held that, given the number of Americans who own firearms to protect their homes, it was "reasonably foreseeable" that the occupant of the shack would be "holding a gun when the officers barged into the shack unannounced." Pet. App. 25a. Of course, the court's improper reliance on the officers' failure to knock and announce—for which they had qualified immunity—only serves to confirm the lack of proximate causation between the *lack of a warrant* and the subsequent events. But the court's reliance on the asserted foreseeability of an armed confrontation reflects a more fundamental deficiency in the court's proximate causation analysis.

As an initial matter, the court's analysis rests upon the supposed foreseeability of an event *that did not occur*, while ignoring the complete unforeseeability of what *did* occur. Mendez did not believe there was an intruder in his bedroom; he thought it was a friend opening the door as a prank. Pet. App. 68a. Nor did Mendez brandish the gun intending to drive off an intruder; instead, he testified that he was using the gun to help himself sit up. Pet. App. 68a-69a. Indeed, the gun was not a true firearm at all, but a BB gun, albeit a very realistic one. Pet. App. 69a. Thus, the factual scenario that the Ninth Circuit described as foreseeable *did not happen*, and the situation that *did* happen—that Mr. Mendez would use a realistic looking toy gun to help him sit up and greet his friend—was totally unforeseeable.

The Ninth Circuit's legal errors are far more troubling, however, than its factual ones. A plaintiff cannot "establish ... proximate cause" when "an intervening cause break[s] the chain of causation between" the act and the injury. *See Bridge v. Phoenix Bond &*

Indem. Co., 553 U.S. 639, 658-59 (2008). Thus, the "law is clear that certain intervening events—otherwise called 'superseding causes'—are sufficient to sever the causal nexus and cut off all liability." *Archer v. Warner*, 538 U.S. 314, 326 (2003) (internal citations omitted). A third party's threat to the safety of police officers or others is such a superseding cause. The Ninth Circuit erred in failing to recognize that, when a threat of violence from a third party provokes a reasonable use of force, that threat is a superseding cause that breaks the causal chain for purposes of proximate cause.

The court seemed to think that the mere fact that violence is "foreseeable"—as opposed, say, to expected or intended—is sufficient to defeat the application of the superseding cause doctrine. Pet. App. 25a. But whatever the role of foreseeability in other contexts, it cannot by itself be dispositive here. Police officers are, by the nature of their duties, routinely sent into perlious situations (such as trying to locate dangerous fugitives) and, sadly, violence against peace officers is all too foreseeable in almost any context. If the mere foreseeable prospect of violence against police officers were sufficient to preclude the application of superseding causation doctrine, then officers would seemingly be deemed to have proximately "caused" all of the violence and displays of force that they encounter as a consequence of any mistake they might make. That cannot be correct.

The court of appeals seemed implicitly to recognize that more than foreseeability was required, because it sought to analogize this "unannounced" entry to the sort of "startling entry" that Justice Jackson condemned in his concurring opinion in *McDonald v. United States*, 335 U.S. 451 (1948). *See* Pet. App.

24a-25a. But the analogy is completely false and instead confirms the Ninth Circuit's error. In *McDonald*, an out-of-uniform officer, without "knowledge of a crime sufficient, even in his own opinion, to justify arrest" of McDonald, "forced open the window of [his] landlady's bedroom and climbed in." 335 U.S. at 457. Justice Jackson questioned the wisdom of undertaking what he characterized as the "felony" of "breaking and entering" where: (1) the crime being investigated was nonviolent; (2) there was no need to enter at that time; (3) the officer had no basis to arrest the suspect he was looking for; and (4) the officer did not know whether the suspect was in the bedroom. *Id.* at 457-61. In this case, the officers did not, without probable cause or uniforms, force open a bedroom window and climb in. Rather, in uniform and with an arrest warrant (Pet. App. 57a), with probable cause to believe a fugitive was hiding in the shack (Pet. App. 93a), during the day time (Pet. App. 56a), the officers opened an unlocked door of a dilapidated shack in the backyard of a house, which they believed to be a storage shed (Pet. App. 66a). To say that the officers in such circumstances should be deemed to have *caused* a violent response effectively—and improperly—eliminates the requirement of proximate causation.

CONCLUSION

The Court should reverse the judgment of the courts of appeals insofar as it upholds the district court's judgment against Petitioners.

Respectfully submitted,

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January 24, 2017